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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA) Criminal Case No.: 11-cr-03507-BTM
11) Civil Case No.: 14-cv-01194-BTM
12 Plaintiff,)
13 v.) **ORDER DENYING DEFENDANT'S**
14) **MOTION TO VACATE / CORRECT**
15) **AN ILLEGAL SENTENCE AND**
16) **DENYING CERTIFICATE OF**
17) **APPEALABILITY**
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On May 12, 2014, Defendant filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. For the following reasons, Defendant's motion is DENIED.

BACKGROUND

On April 6, 2012, Defendant was sentenced to a fourteen month prison term after pleading guilty to fraud and misuse of visas, permits, and other documents in violation of 18 U.S.C. § 1546(a). (Doc. 31). Upon release from imprisonment, Defendant was subject to supervised release for three years, subject to the conditions, among others, that he would not commit another federal, state, or local crime and that he would not reenter the United States illegally. (Doc. 31).

On January 2, 2013, a probation officer sought an arrest warrant for Defendant,

1 alleging that “[o]n or about October 4, 2012, Mr. Alcantar-Baca . . . a previously
 2 deported/removed alien, was found in the United States, in violation of 8 U.S.C. §
 3 1326.” (Doc. 33). A warrant was issued, Defendant was arrested, and Defendant’s
 4 supervised release was subsequently revoked on May 31, 2013. (Docs. 34, 37, 42).
 5 Defendant admitted he had violated the conditions of his supervised release and the
 6 Court sentenced Defendant to a nine month prison term consecutive to the new
 7 twenty-seven month term was serving for violation of 8 U.S.C. § 1326 (12-cr-04496-
 8 WQH, doc. 28). (Doc. 43).

9 On May 12, 2014, Defendant filed a motion to vacate his sentence pursuant to
 10 28 U.S.C. § 2255. (Doc. 44). On June 30, 2014, he filed a supplemental memorandum
 11 in support of his motion. (Doc. 45).

12 DISCUSSION

13 28 U.S.C. § 2255(a) provides:

14 A prisoner in custody under sentence of a court established
 15 by Act of Congress claiming the right to be released upon
 16 the ground that the sentence was imposed in violation of the
 17 Constitution or laws of the United States, or that the court
 18 was without jurisdiction to impose such sentence, or that
 19 the sentence was in excess of the maximum authorized by
 20 law, or is otherwise subject to collateral attack, may move
 the court which imposed the sentence to vacate, set aside or
 correct the sentence.

21 Defendant explains in his motion and supplemental filing that he would like to
 22 apply for United States citizenship and that, if granted, his sentence for illegal re-
 23 entry would be “null and void.” Defendant cites Varteias v. Holder, 80 W.S.L.W.
 24 1338 (U.S. 2012) for the proposition that non-citizens charged with illegal re-entry
 25 following a conviction may collaterally attack their deportation.

26 The Court is unable to locate the case cited by Defendant. There is, however, a
 27 Vartelas v. Holder, 132 S.Ct. 1479 (2012), which held that the Illegal Immigration
 28 Reform and Immigrant Responsibility Act, which required lawful permanent

1 residents who departed from the United States, even briefly, to seek admission upon
 2 return, did not apply retroactively to aliens who committed felony offenses prior to
 3 the Act's effective date. Id. at 1486, 1491-92. Vartelas appears to have no application
 4 to Defendant's case.

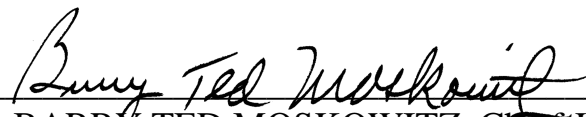
5 However, in this case, Defendant is actually attacking his underlying
 6 conviction for violation of 8 U.S.C. § 1326 (12-cr-04496-WQH). This conviction is
 7 the factual predicate for the Court's revocation of his supervised release. But there are
 8 three bars to this attack. First, the conviction was before the Honorable William
 9 Hayes, and thus a challenge would have to be filed before Judge Hayes. Second,
 10 Defendant waived his right to collaterally attack his conviction and sentence as part
 11 of his plea agreement. (12-cr-04496-WQH, doc. 18 section XI). See United States v.
 12 Abarca, 985 F.2d 1012, 1014 (9th Cir. 1993). Third, Defendant's challenge is
 13 meritless. Defendant's assertion that, if he were granted citizenship, his prior
 14 conviction would be "null and void" is entirely without basis. Defendant may, of
 15 course, apply for citizenship going forward. But even if Plaintiff were granted
 16 citizenship, it would not apply retroactively or otherwise erase his prior unlawful act.
 17 There being no basis for Defendant's claim, Defendant's motion is denied.

18 CONCLUSION

19 Defendant's motion to vacate, set aside, or correct his sentence, and a
 20 certificate of appealability, are DENIED. The Clerk shall enter judgment accordingly.
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22 **IT IS SO ORDERED.**

23 Dated: August 28, 2014

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 25 BARRY TED MOSKOWITZ, Chief Judge
 26 United States District Court
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